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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERTO DIAZ SANCHEZ,

Defendant and Appellant.

F058796

(Fresno Sup. Ct. No. F08902605)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Nuttall & Coleman, Nuttall Coleman & Wilson, Roger T. Nuttall and Glenn M. Kottcamp for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and A. Kay Lauterbach, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Gilberto Diaz Sanchez was convicted of three counts of second degree murder, one count of attempted second degree murder, and four counts of kidnapping, based on an incident where he held four men at gunpoint in a house, repeatedly threatened to kill them, and forced them into a vehicle. He followed the vehicle as his accomplice, Gabino Luis Basurto (Basurto), drove the four men into the field and fatally shot three of them—Rafael Moreno Espinoza (Rafael); his brother, Eraclio Moreno Espinoza (Eraclio); and Juan Zepeda Valencia (Juan), also known as Carlos Albert Figueroa. The fourth man, Cuahutemoc Valencia (Valencia), ran away as the other men were murdered and survived the harrowing incident.¹

On appeal, defendant contends that his convictions as an aider and abettor of murder and attempted murder are not supported by substantial evidence, based on his pretrial statements and trial testimony that he did not know Basurto was going to kill the victims. He also challenges the evidence in support of two of the four kidnapping convictions. Finally, he contends the jury improperly received the flight instruction. We will affirm.²

¹ Given the common names, we refer to several of the parties by their first names; no disrespect is intended. There is no evidence that the lone survivor, Cuahutemoc Valencia, was related to Juan Zepeda Valencia, also known as Carlos Albert Figueroa.

² Basurto was separately tried and convicted of three counts of first degree murder, with a multiple murder special circumstance, and one count of attempted first degree murder. This court affirmed his convictions on appeal. In doing so, this court's unpublished opinion referred to some of the parties by different aliases, based on the testimony that was introduced in that case. For example, "Juan" was identified only as Carlos Albert Figueroa. Defendant's second accomplice was identified as "Poncho," whereas the evidence in this case identified that individual as Francisco Diaz (Francisco), also known as "El Grande." (See *People v. Basurto* (Oct. 31, 2007, F051594) [nonpub. opn.].) In this opinion, we will identify the parties based on the evidence introduced at defendant's trial.

FACTS

On May 22, 2005, Valencia was staying with his sister and her husband, Eraclio, in Fresno. Around 3:00 p.m., Valencia went to a water park with Eraclio and his family. Rafael, Eraclio's brother, also joined them with his own family. Juan met them at the water park. Valencia did not know Juan or how he was connected with Eraclio and Rafael.

Around 5:00 p.m., the entire group left the water park. Juan invited Valencia to join the other men to watch a soccer game at a friend's house. Valencia agreed. The women and children left the water park and went home.

Arrival at Basurto's house

Valencia testified he left the water park in Juan's four-door red Jeep Cherokee. Juan drove Valencia, Eraclio, and Rafael to a house on North Chance Street. Juan said the house belonged to his friend "Luis," later identified as Basurto. Valencia did not know Basurto.

Valencia testified that Juan parked the red Jeep in front of Basurto's house, called Basurto, and told him that they were outside. Valencia testified that Basurto let them into the house, and they walked into the living room. Basurto immediately locked the front door from the top and bottom. Basurto then said he was going to use the restroom, and walked out of the living room. Valencia, Rafael, Eraclio, and Juan stayed in the living room.

Defendant enters the living room

Valencia testified that within a few moments, Basurto returned to the living room with two gunmen. The two gunmen were later identified as defendant and Francisco Diaz, defendant's uncle, who was also known as "El Grande."

Defendant pointed a handgun at everyone. Valencia was afraid and apparently tried to run away. Defendant aimed the gun at Valencia and said that Valencia would be killed if he tried to run. Defendant told Valencia, Rafael, Eraclio, and Juan to get on the

floor. The four men obeyed his orders. Defendant told Basurto to tie up the four men. Basurto used plastic zip-ties and tied up the hands and feet of the four men, with their hands tied behind their backs, while they were laying face-down on the floor.

Valencia testified that defendant gave all the orders to Basurto and the other gunman. Valencia heard defendant say that he was from Minnesota. Defendant told Basurto to take everything from the victims. Basurto removed wallets and jewelry from Valencia, Rafael, and Juan, and placed them in a Macy's shopping bag. Eraclio did not have a wallet. Defendant told Basurto to check the Jeep for any other possessions that belonged to the four men.

Defendant orders Basurto to kill the victims

Valencia testified that defendant told Basurto to put tape over Valencia's mouth and kill him. Basurto taped Valencia's mouth, and the other victims yelled not to kill Valencia. Valencia was crying and desperate. Defendant produced another plastic cord and told Basurto to kill Valencia. Valencia thought Basurto was going to strangle him with the plastic cord.

Defendant then told the other victims to calm down or he would kill all of them. The other victims calmed down, and defendant told Basurto to remove the tape from Valencia's mouth.

The victims are moved from the house to the garage

Valencia testified that defendant told Basurto and the other gunman to move the victims into a car that was in the garage, "because they were going to take us two at a time." The victims' ankles were still tied. Basurto and the other gunman lifted up Valencia and Rafael and carried them to a gray car that was parked in the garage.

The victims are moved from the garage to the house

Valencia testified they remained in the garage for awhile. At some point, Eraclio was brought into the garage, untied, and told to start the car. The car did not start,

however, and the second gunman removed Valencia and Rafael from the car and took them back into the house.

Rafael pleaded with the gunmen to loosen the plastic ties because they were too tight. Basurto used a blade and cut the zip-ties from the victims' hands and legs. Basurto then used gray tape and restrained the victims' hands in front of their bodies. Their feet were not taped.

Valencia testified that defendant was present when Basurto cut the plastic ties and used the tape to restrain their hands. Defendant still had the gun. Defendant told Basurto to kill everyone, or defendant would kill Basurto and his family.

Valencia testified that defendant then told the victims that they were going to take them to a place and leave them there, and they would call their families the next day to pick them up. Defendant told Valencia not to run because he would kill him.

The victims are moved from the house to the Jeep

Defendant, Basurto, and the other gunman took the four victims from the house and placed them in the Jeep, which was still parked in front of the house. The victims' hands were tied in front of their bodies with tape, but their legs were not bound and they were able to walk to the Jeep. Juan was placed in the front passenger seat, Valencia was in the rear passenger-side seat, Eraclio was in the rear driver's-side seat, and Rafael was in the middle of the back seat.

Valencia testified that Basurto got into the driver's seat of the Jeep and drove away from the house with the four victims. Valencia looked back and thought a black truck was following them.

Valencia testified that Basurto drove away slowly and then stopped. Juan told Basurto "to take us." Basurto said "[N]o. Wait. Because they were coming in the back." Valencia looked behind and saw the black truck. Juan asked Basurto if he had a gun, and Basurto said yes. Basurto said, " '[T]he guys behind are coming, ' " and accelerated the Jeep.

Basurto drives the Jeep into the field

Valencia testified that Basurto drove the Jeep into a construction site in a field. Basurto stopped the Jeep by a big pile of dirt. Valencia opened the back door and ran, because he was frightened by defendant's repeated orders to shoot all the victims. As he ran from the Jeep, someone fired multiple gunshots at him. He looked back and saw flashes from the shots. He fell down, but he was not wounded. He got up and kept running. His hands were still taped together, and he bit off the tape with his teeth.

Valencia testified he kept running and continued to hear gunshots fired behind him. He jumped a fence, landed in a residential area, and started knocking on doors. Valencia yelled for help and shouted that his friends were in danger. Someone finally opened their door, and Valencia asked them to call the police and to help him.

Valencia testified that he was still scared when the police arrived. He did not know what happened to his friends. Valencia testified he had never been involved with drugs or drug transactions. He did not know if any of his friends were involved with drugs. Valencia never saw any drugs while he was at Basurto's house.

The police respond

Around 10:30 p.m., officers from the Clovis Police Department responded to the dispatch that a Hispanic male arrived at a house and reported a shooting near the intersection of Shepherd and Willow Avenues.

Officer Cartwright arrived at the scene and encountered Valencia, who was extremely frightened and agitated. Cartwright testified that in his nine years as a police officer, he had never seen anyone as frightened as Valencia. Valencia was so scared that he vomited in the street.

Cartwright testified his initial attempt to interview Valencia was a struggle because of Valencia's emotional condition and poor English. Valencia told Cartwright that he and three friends were at a house; he waited in the car with two friends while the third friend went into the house, and the third friend and an unknown man returned to the

car. Valencia said the man, later identified as Basurto, drove the red car and a black truck followed them. They stopped in a field; Basurto started to shoot them; and Valencia ran away as multiple shots were fired. Valencia did not mention anything about going into a house or being restrained by duct tape.

Officer Gomez arrived at Cartwright's location and interviewed Valencia in Spanish. Valencia was still nervous, upset, and crying. Gomez repeatedly advised Valencia to calm down and stop crying so they could get a statement. After awhile, Valencia calmed down, and he was able to answer questions. Valencia then explained that he had been inside a house with the other men.

Discovery of the bodies

Officer Kristina Gilpin headed for the field near Shepherd and Willow. It was a secluded area surrounded by orchards, an open field, and an uninhabited subdivision. There were barricades that blocked street access because it was also a construction area. There were no street lights.

Gilpin drove around the barricades and found a red Jeep Cherokee parked next to a dirt mound that was taller than the Jeep.

Gilpin found three bodies in and around the Jeep, and described it as one of the most dramatic scenes she had seen in her career. One victim in a blue shirt was on the ground by the front passenger door. Another victim in a red shirt was on the ground by the rear passenger door, and the third victim in a white shirt was inside the Jeep and wedged between the back and front seats.³

The parties stipulated to the identities and fatal wounds suffered by the victims. Juan died from one gunshot in the back of his head and two in his lower back. Rafael died from one gunshot in the back of his head and two in the shoulder. Eraclio died from

³ Valencia had testified that Juan was wearing a blue shirt and sitting in the front passenger seat, Eraclio was wearing a white shirt and sitting in the rear driver's-side seat, and Rafael was wearing a red shirt and sitting in the middle of the back seat.

one gunshot in the back of his head and one in his face. All of the gunshots were fired at close range, and the blood sprays in and around the vehicle indicated the victims were fatally shot in the positions in which their bodies were found.

There were 8 nine-millimeter shell casings found at the murder scene, in and around the Jeep and the victims' bodies. A Macy's bag was under the Jeep, and it contained the wallets of Juan, Rafael, and Valencia.

The victims' hands were duct-taped together. Basurto's fingerprint was found on duct tape that was cut off from one of the victims. There were pieces of used and torn duct tape found in the field about 400 feet away from the Jeep. Basurto's cell phone was found in the field about 20 feet away from the Jeep and between the Jeep and the used duct tape.

Search of the North Chance house

An officer drove Valencia around the area that night until he was able to find and identify the North Chance Street house where the incident began. The house was about three to five miles away from the location where the bodies were found. The house was a rental unit, and the owner did not know anything about the crime.

On the morning of May 23, 2005, the day after the homicide, the police searched the North Chance residence. There were documents and letters in the rental house which belonged to Basurto, Diana Teran (Basurto's girlfriend), and Teran's sister, Anabell Sanchez.

A knife was on the living room coffee table. A shoebox was hidden in the living room's vaulted ceiling. It contained \$44,000, with the cash stacked by denominations.

The police found an empty Glock gunbox in a bedroom dresser drawer. They also found \$14,000 cash in the same dresser with the cash separated into thousand-dollar stacks. A box of .45-caliber Winchester ammunition was found on the top shelf of the bedroom closet, and a magazine with .45-caliber rounds was in a dresser drawer. A scale with methamphetamine residue was also in the bedroom.

A silver Honda was in the garage. The Honda was registered to a person who lived in Santa Ana, but that person had no knowledge of the vehicle, and the actual owner of the Honda was never located.

A piece of a cut zip-tie was found on the Honda's rear passenger floorboard. Another piece of a cut zip-tie and a piece of used gray/silver duct tape were on the garage floor. The duct tape found in the garage was similar in color and size to the duct tape that was found in the orchard.

A Volkswagon Passat with a Minnesota license plate was parked in front of the house. It was registered to defendant, and the registration papers were found in the bedroom.

The Honda and Volkswagon were X-rayed to look for hidden drug compartments but nothing was found.

The officers continued to interview Valencia in the hours after the discovery of the bodies. He was still terrified, but he had calmed down. Valencia made it clear that defendant was in charge of the entire incident at the house. The police department later determined Valencia was not involved in any illegal drug activity.

Basurto's arrest

On the morning of May 23, 2005, the day after the homicide, police officers found a black pickup truck at a Reedley motel. The truck matched Valencia's description of the suspect's vehicle that had followed the Jeep into the field. Basurto was arrested as he got into the truck. Teran was also present.⁴ A Glock semiautomatic nine-millimeter handgun was found under the truck's passenger seat. It was stipulated that the Glock was the weapon used to fatally shot Juan, Rafael, and Eraclio.

⁴ The police were already investigating the possible involvement of Basurto and Teran in other drug robberies. The instant record is silent as to whether Teran was charged with any offenses.

The officers escorted Valencia to the motel and asked him to look at Basurto. Valencia began to cry and shake when he saw Basurto. He immediately identified Basurto as the gunman and exclaimed, “[T]hat is the bastard that killed my friends.”

Defendant’s telephone call

On August 9, 2006, Clovis Police Detective Joe Alvarado received a telephone call at his desk. The caller identified himself as defendant. Defendant said he was present when the three victims were killed, but he did not pull the trigger. Defendant said Basurto killed the victims. Defendant also said Basurto was at the house with a suspect named “Juan” and another person known as “El Grande.”

Defendant said that on the day of the murders, he arrived at the North Chance house, and the other two suspects were already there. Defendant admitted the Volkswagon belonged to him, but said that he had sold it to “Diane.” The victims arrived after 4:00 p.m. Defendant said he held a black .22-caliber gun on the victims, but he did not tie up anyone.

Defendant said he knew that Basurto was going to kill the victims. Defendant refused to turn himself in because there was no one to care for his children. Defendant said he was leaving for Mexico to start a new life.

Defendant’s postarrest statements

On April 17, 2008, defendant was arrested in Visalia by a SWAT team. Detective Alvarado advised him of the *Miranda*⁵ warnings, and he agreed to answer questions. Defendant acknowledged that he had called Alvarado in 2006. Defendant said the person known as “El Grande” was his uncle, Francisco Diaz.

At trial, Detective Alvarado testified about defendant’s extensive statements regarding the kidnappings and murders. Defendant said he had been living in Minnesota before the murders. He arrived in Fresno and was looking for money. Defendant was

⁵ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)

invited to a party at Basurto's house for Teran's daughter. He had heard that Teran and Basurto were involved in robberies and would kill people. Defendant said Teran was a "dope ripper," someone who made deals with and then robbed drug dealers.

Defendant told Alvarado that on the night before the murders, he met Basurto, Teran, and Francisco at a Fresno nightclub. Defendant said a "contract" was made with Basurto, that they were going to rob, steal drugs, and kill a drug dealer named "Juan." Alvarado testified to defendant's statement about the contract:

"Basically, that it was going to be a dope rip the following day. That [defendant] was going to be assisting ... Basurto, the dooper. And that they were going to pay [defendant] \$6,000. And they talked about the details and the fact that they were going to tie up one of the drug dealers by the name of Juan. And they were going to take him out and kill him."

Defendant told Alvarado that he agreed to assist in the contract for the robbery. He also knew "they were going to end up killing Juan, but that his part was to, basically, hold a gun and point it at the victims," and he would be paid \$6,000. Francisco would also receive \$6,000.

Defendant told Alvarado that he and Francisco were offered an additional \$1,000 if they killed the drug dealer. Defendant said they both "accepted it and eventually received it."

Defendant said he received directions to the North Chance house. Defendant and Francisco met Basurto at the house. Shortly afterward, the four victims arrived at the house. Defendant said Basurto pulled his gun, and defendant and Francisco followed him. Defendant held the victims at gunpoint while Basurto tied their hands and wrists with zip-ties. Defendant said none of the victims were armed, and he never saw any drugs. However, defendant also said one of the victims arrived in a gray car, and there was a suitcase of cocaine that had been removed from that car.

Defendant admitted that he told Basurto to kill all the men. However, defendant said he was just acting so the victims would not try anything.

Defendant said that Teran was the “author” of the crime. The contract was only to kill one person, but three other people showed up. Defendant said that after the incident began, he talked to Basurto about the other victims and asked for more money “because there was an additional three bodies.” Basurto offered defendant another \$1,000 if he helped him kill all the victims. Defendant claimed he did not accept the offer. However, he remained in the house and continued to assist Basurto.

Defendant said that he told Basurto and Teran not to kill anyone. Defendant insisted he was only offered money to tie someone up so they could steal drugs.

Defendant said he helped Basurto move the four victims into the Jeep. Defendant and Francisco got into a black pickup truck, which belonged to Basurto and Teran. Defendant drove the truck and followed Basurto as he drove the Jeep. Defendant said he knew Basurto was going to kill the victims. Basurto drove in the field and killed three men.

Defendant said he stayed in the truck, and he did not hear anything because the windows were closed. He saw Basurto running with a handgun. Basurto got into another black pickup truck which was driven by Teran, and which was also in the field.

Defendant said that after the murders, he met Basurto and the others in Dinuba and they exchanged vehicles. Defendant was not paid that night, and he returned to Minnesota. Defendant said he was eventually paid when the money was wired to him in Mexico. Francisco was also paid.

DEFENSE EVIDENCE

Defendant testified at trial and admitted he called Detective Alvarado and talked about the incident. However, his trial testimony was different compared to his pre and postarrest statements to Detective Alvarado. Defendant testified that Basurto was like an older brother to him. Defendant had heard that Basurto and his girlfriend, Diana Teran, were involved in drug trafficking.

Defendant testified that Basurto called him in Minnesota and asked him to help with a drug deal at the North Chance house. Basurto said he was going to be involved in a cocaine deal which involved almost \$250,000 and asked defendant to provide protection for him. Defendant's uncle, Francisco Diaz, was also asked to provide security. Basurto promised to pay \$6,000 to both defendant and Francisco. Defendant realized this was going to be a dangerous situation.

Defendant testified that when he initially arrived at the house, Basurto offered him another \$1,000 to kill someone. Defendant testified that he was surprised, he refused, and he told Basurto not to kill anyone. Basurto gave defendant a .22-caliber gun. Defendant and Francisco waited in another room for the person to arrive, and they were only supposed to come out if there were problems.

Defendant testified that only one person, "Juan," was supposed to be there for the drug transaction, but Juan arrived with three other people. Juan and the other three men arrived in two cars: a red Jeep, parked in front of the house, and a gray car which a victim parked in the garage. Defendant believed Valencia was in the gray car that pulled into the garage.

Basurto told defendant and Francisco to help him because four men arrived. Defendant admitted he pointed the gun at the victims but claimed he followed Basurto's orders, and that Basurto was on the telephone with Teran, who was giving the instructions. Basurto took the victims' wallets to check their identifications.

Defendant testified that Basurto became angry when the other three people arrived. He asked Juan why they were there. Juan said he talked to Teran, and she said it was okay for the others to be there.

Basurto threatened to kill all the men. Defendant pleaded with Basurto not to kill the men. Basurto replied that Teran said to kill them because Juan knew personal information about her. However, Basurto promised defendant that he would just take the victims and "throw them out."

Defendant testified he took the telephone from Basurto, spoke directly to Teran, and told her not to have the men killed. Teran insisted that they had to be killed.

Defendant testified the problem became “bigger,” and he sat on the sofa and did not want anything more to do with “those people.” However, defendant remained in the house and did not intervene or help the victims. Basurto tied up the four victims with duct tape, put them in the Jeep, and got into the driver’s seat.

Defendant testified that at some point, a suitcase was removed from the gray car, and it contained drugs. Defendant testified he gave the suitcase to Teran, who had apparently arrived at the house. Teran opened the suitcase, and defendant saw packages, which he believed contained cocaine.

Defendant got into a black truck while Teran and Francisco were in another black truck. Defendant asked Teran for directions to the freeway because defendant intended to drive to his sister’s house in Dinuba. Teran told defendant to follow her car. Defendant drove the black truck, followed Teran’s truck, and they arrived in a field. Defendant testified he never heard any shots in the field, but he saw Basurto run and get into Teran’s truck. Defendant claimed he did not know anyone had been killed until they arrived at his sister’s house in Dinuba, and Basurto told him.

Defendant testified that he went to the North Chance house without knowing that Basurto was going to kill the men. Defendant never threatened to kill Valencia or hurt anyone. None of the victims had any weapons, and he did not know them. He further testified that Teran ordered Basurto to kill the victims. Defendant admitted that he knew Basurto would buy and steal drugs from people. Defendant never called anyone for help that night because he was sure that Basurto was not going to kill the victims. Defendant claimed he would have called the police if he had known that Basurto was going to kill the men. However, defendant admitted that he was present when Basurto threatened to kill the men.

The charges, convictions, and sentence

In 2006, Basurto was separately tried and convicted of three counts of first degree murder, with a multiple murder special circumstance (Pen. Code,⁶ § 190.2, subd. (a)(3)), and one count of attempted murder. Basurto was sentenced to 75 years plus 20 years to life without parole, followed by three consecutive terms of 25 years to life, and three consecutive life terms without the possibility of parole. On October 31, 2007, this court affirmed Basurto's convictions in an unpublished opinion. (*People v. Basurto, supra*, F051594.)

In 2008, defendant was charged with three counts of first degree murder (§ 187, subd. (a)), with a multiple murder special circumstance (§ 190.2, subd. (a)(3)), and the special allegation that defendant personally used a firearm (§ 12022.53, subd. (b)); one count of attempted first degree murder with the special allegation that defendant personally used a firearm (§ 12022.53, subd. (b)); four counts of kidnapping (§ 207, subd. (a)); and three counts of second degree robbery (§ 211).

In 2009, after a lengthy jury trial, defendant was convicted of three counts of the lesser included offenses of second degree murder (counts I-III), with the firearm enhancement found true, and the multiple murder special circumstance found not true; the lesser included offense of attempted second degree murder (count IV), with the firearm enhancement found true; and four counts of kidnapping (counts V-VIII). He was found not guilty of three counts of second degree burglary (counts IX-XI).

Defendant was sentenced to an aggregate term of 45 years to life plus 47 years.

⁶ All further statutory citations are to the Penal Code unless otherwise indicated.

DISCUSSION

I. Defendant's convictions are supported by substantial evidence

Defendant was convicted as an aider and abettor on three counts of second degree murder and one count of attempted second degree murder, based on the evidence that Basurto fired the fatal shots.

On appeal, defendant contends his convictions as an aider and abettor for murder and attempted murder are not supported by substantial evidence. In making this argument, defendant exclusively relies on his pretrial statements and trial testimony that he only agreed to help Basurto with the drug robbery; he never intended to kill anyone; he did not think Basurto was going to kill the victims; he told Teran and Basurto not to kill them; and he withdrew from his participation in the crimes before Basurto drove the victims into the field.

A. Substantial evidence

In reviewing defendant's substantial evidence contentions, we are guided by well-settled principles on appeal. When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"In making this determination, we do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses. [Citation.] Moreover, because it is the jury, not the reviewing court, that must be convinced of the defendant's guilt beyond a reasonable doubt, we are bound to sustain a conviction that is supported by only circumstantial evidence, even if that evidence is

also reasonably susceptible of an interpretation that suggests innocence. [Citation.]” (*People v. Little* (2004) 115 Cal.App.4th 766, 771; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

“Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 403.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin, supra*, 18 Cal.4th at p. 331.)

B. Second degree murder

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) “Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]” (*People v. Lee* (2003) 31 Cal.4th 613, 623.)

“Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.] [¶] Malice may be express or implied. [Citation.] It is express ‘when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.’ [Citation.] It is implied ‘when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.’ [Citation.] We have held that implied malice has both a physical and a mental component, the physical component being the performance of ‘“an act, the natural consequences of which are dangerous to life,” ’ and the mental component being the requirement that the defendant ‘“knows that his conduct endangers the life of another and ... acts with a conscious disregard for life.” ’

[Citations.]” (*People v. Hansen* (1994) 9 Cal.4th 300, 307-308, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201, fn. 8.)

C. Aiding and abetting

“ ‘All persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or aid and abet in its commission, ... are principals in any crime so committed.’ [Citations.] Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. [Citation.] Because aiders and abettors may be criminally liable for acts not their own, cases have described their liability as ‘vicarious.’ [Citation.] This description is accurate as far as it goes. But ... the aider and abettor’s guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator’s acts and the aider and abettor’s *own* acts and *own* mental state.” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117, italics in original.)

A person aids and abets the commission of a crime when he, acting (1) with knowledge of the perpetrator’s unlawful purpose, and (2) with intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates the commission of the crime. (*People v. Croy* (1985) 41 Cal.3d 1, 11-12; *People v. Beeman* (1984) 35 Cal.3d 547, 561.) Direct evidence of the mental state is rarely available and may be shown with circumstantial evidence. (*People v. Beeman, supra*, at pp. 558-559.)

“ ‘To prove that a defendant is an accomplice ... the prosecution must show that the defendant acted “with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” [Citation.] When the offense charged is a specific intent crime, the accomplice must “share the specific intent of the perpetrator”; this occurs when the accomplice “knows the full extent of the perpetrator’s criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator’s commission of

the crime.” [Citation.]’ [Citation.] What this means here, when the charged offense and the intended offense--murder or attempted murder--are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator.” (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118, fn. omitted.)

Thus, to be guilty of murder and attempted murder as an aider and abettor, “a person must give aid or encouragement with knowledge of the direct perpetrator’s intent to kill and with the purpose of facilitating the direct perpetrator’s accomplishment of the intended killing – which means that the person guilty... as an aider and abettor must intend to kill. [Citation.]” (*People v. Lee*, *supra*, 31 Cal.4th 613, 624.)

“[P]roof of an *attempt* by a direct perpetrator is sufficient for purposes of aiding and abetting liability. If a direct perpetrator is thwarted and guilty only of an attempt, an aider and abettor may still be guilty of aiding and abetting the attempt. [Citations.]” (*People v. Perez* (2005) 35 Cal.4th 1219, 1226, italics in original.)

Finally, in order to withdraw as an aider and abettor, a party must notify his accomplices and have “done everything in his power to prevent commission of the crime. [Citation.]” (*People v. Belmontes* (1988) 45 Cal.3d 744, 793; *People v. Jackson* (1996) 13 Cal.4th 1164, 1221.)

D. CALCRIM No. 401

The jury in this case was instructed with CALCRIM No. 401, aiding and abetting and intended crimes:

“To prove the defendant is guilty of a crime based on aiding and abetting that crime the People must prove that one, the perpetrator committed the crime; two, the defendant knew that the perpetrator intended to commit that crime; three, before or during the commission of the crime the defendant intended to aid and abet the perpetrator in committing that crime; and four, the defendant’s words or conduct did in fact aid and abet the perpetrator’s commission of the crime.

“Someone aids and abets a crime if he knows of the perpetrator’s unlawful purpose and he specifically intends to and does in fact aid, facilitate, promote, encourage or instigate the perpetrator’s commission of that crime. If all of these requirements are proved then the defendant does not need to have been actually present when the crime was committed to be guilty as an aider and abettor.

“If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him an aider and abettor.

“A person who aids and abets a crime is not guilty of that crime if he withdraws before the crime is committed. To withdraw a person must do two things; one, he must notify everyone else he knows is involved in the commission of the crime that he is no longer participating. That notification must be made early enough to prevent the commission of the crime; and two, he must do everything reasonably within his power to prevent the crime from being committed. He does not have to actually prevent the crime.

“The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden then you may not find the defendant guilty under an aiding and abetting theory.”⁷

CALCRIM No. 401 correctly states law on aiding and abetting. (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1103.)

E. Analysis

Defendant contends the prosecution failed to prove all the elements of aiding and abetting beyond a reasonable doubt, as set forth in CALCRIM No. 401. Defendant argues there is insufficient evidence that he knew Basurto intended to murder the victims, that he intended to aid and abet Basurto in murdering the victims, before or during the commission of the crimes, and that he did in fact aid and abet Basurto’s commission of

⁷ The jury was not given CALCRIM No. 402 and/or No. 403, as to the natural and probable consequences doctrine.

the crimes by his words or conduct. Defendant further argues that he withdrew from his prior agreement with Basurto, prior to the moment when the four men were loaded into the Jeep and driven into the field.⁸

Defendant's convictions as an aider and abettor for three counts of second degree murder, and one count of attempted second degree murder, are supported by overwhelming evidence, based on the trial testimony of Valencia, the lone survivor. Valencia repeatedly testified that defendant was in control of the entire situation. He entered the living room with a gun, pointed the weapon at the four men, and ordered them to get on the floor. Valencia apparently made a move to escape, and defendant specifically threatened to kill Valencia if he tried to run. Defendant ordered Basurto to tie them up, and told Basurto to take everything from them. Basurto restrained the men with zip-ties while they were laying face-down on the floor.

Defendant ordered Basurto to tape Valencia's mouth and kill him. Basurto again followed defendant's orders, produced another plastic zip-tie, and Valencia believed he was about to be strangled. The record strongly implies that the only reason Valencia was not killed at that moment was because the other three men yelled and pleaded for his life. However, defendant remained in control of the situation. Basurto did not withdraw from the act until defendant told him to remove the tape from Valencia's mouth. Defendant then told the men that he would kill all of them unless they calmed down.

⁸ In making these arguments, defendant has only cited to the provisions of CALCRIM No. 401 for the elements of being an aider and abettor, instead of any legal authorities. As noted by the People, however, jury instructions "are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate ... they restate the law." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) In any event, we evaluate defendant's substantial evidence contentions based on the law as stated, *ante*.

Defendant's control over the situation continued as he told Basurto and Francisco to move the four victims into the garage, two at a time. Basurto and Francisco carried two of the victims into the garage. The only reason the men were removed from that car, however, was because the vehicle would not start.

Valencia testified they were taken back into the house. Defendant was still there and armed when Basurto cut off the plastic zip-ties from the victims' hands and feet, and immediately restrained the men's hands with duct tape. At that point, defendant told Basurto to kill everyone, or defendant would kill Basurto and his family.

Defendant then told the victims they would be dropped off someplace for their families to pick them up. Defendant again threatened Valencia that he would kill him if he tried to run. Defendant, Basurto and Francisco took the four men from the house into the Jeep. Basurto drove the Jeep into the field, while defendant followed in the pickup truck. Basurto murdered the three victims while Valencia ran for his life, and defendant waited in the field in the other truck.

Valencia's testimony thus establishes that defendant knew Basurto was going to kill the men, that defendant intended to aid and abet Basurto by his conduct before the murders, and defendant's words and conduct in fact aided and abetted the murders. Defendant continually exercised control over the entire situation, and repeatedly ordered Basurto to kill all the men. While defendant may have told the men that they would be dropped off and released somewhere, the record strongly implies that he made that statement to avoid the same type of hysteria demonstrated by the men when he ordered Basurto to kill Valencia in the living room.

Defendant's arguments

In his appellate brief, defendant virtually ignores Valencia's testimony about the kidnappings and murders, and instead relies on his own trial testimony in support of his argument that his convictions are not supported by substantial evidence, particularly that he did not know Basurto intended to kill the victims, that he never intended to aid and

abet murder, that he tried to convince Basurto and Teran not to kill the victims, that Basurto later assured him he would drop off the victims someplace and not kill them, and that he had no idea that Basurto was going to kill the men when he drove the Jeep into the field. Defendant further asserts that he withdrew from his prior “contract” with Basurto before the victims were placed in the Jeep and driven into the field, again based on his trial testimony that he did not want anything more to do with Basurto’s drug transaction, that he wanted to leave and had asked Teran for directions to the freeway so he could drive to his sister’s house, and she told him to follow her truck, and he did so with the belief that she was taking him to the freeway.

Defendant further argues that Valencia was not credible because he never satisfactorily explained his presence in the North Chance house during a purported drug deal. Defendant asserts that Valencia was not as “forthright” about the purported drug deal as defendant was during his own trial testimony, and Valencia’s failure to address this issue undermined his credibility as to whether defendant or Basurto was the person in charge during the kidnappings and murders.

The jury’s credibility determination

As we have explained, however, in reviewing convictions for substantial evidence, we do not reweigh the evidence, resolve evidentiary conflicts, or reevaluate the credibility of the witnesses, which are all matters within the jury’s exclusive province. (*People v. Little, supra*, 115 Cal.App.4th 766, 771; *People v. Young, supra*, 34 Cal.4th 1149, 1181; *People v. Maury, supra*, 30 Cal.4th 342, 403.) The jury in this case heard the trial testimony of both Valencia and defendant. The jury also heard the prosecution’s evidence about defendant’s pretrial statements. The jury obviously made its own credibility determinations and discounted defendant’s claims that he was not in charge of the situation, and he did not know the men were going to be murdered.

Moreover, defendant’s own statements supported many details of Valencia’s testimony. During defendant’s telephone conversation with Detective Alvarado, he said

he was present when the three victims were killed, but that Basurto killed them.

Defendant also said he knew that Basurto was going to kill the victims.

In his postarrest statement, defendant admitted that he knew Basurto and Teran were involved in robberies and murders and he made a contract with Basurto to rob, steal drugs, and kill a drug dealer named “Juan.” Defendant said that he knew “they were going to end up killing Juan, but that his part was to, basically, hold a gun and point it at the victims,” and he would be paid \$6,000. Defendant further said that he and Francisco were offered an additional \$1,000 if they killed the drug dealer, and they both “accepted it and eventually received it.” Defendant admitted that he told Basurto to kill the men but claimed he was just acting.

By the time of trial, defendant still admitted that he agreed to provide security for Basurto’s drug transaction, and that he was offered additional money to kill. He also admitted that he was present when Basurto said he was going to kill the four men. However, he changed his story and claimed he refused the additional money, he repeatedly begged Basurto and Teran not to kill the victims, and he believed Basurto was going to let the victims go. He also claimed that Teran gave the orders to Basurto over the telephone, and Basurto and defendant followed Teran’s orders.

As for his insistence that he withdrew from his prior “contract,” he merely claimed that he sat on the sofa and did not want anything more to do with the deal, but he never intervened to release the men despite Teran’s repeated orders to kill them and her alleged refusal to heed defendant’s pleas to let them go. He also admitted accepting the promised fee of \$6,000 for his assistance. Even if his testimony on this point is given any credence, it still failed to show that he withdrew from his involvement in the crimes. As explained *ante*, in order to withdraw as an aider and abettor, a party must notify his accomplices and have “done everything in his power to prevent commission of the crime. [Citation.]” (*People v. Belmontes*, *supra*, 45 Cal.3d 744, 793; *People v. Jackson*, *supra*, 13 Cal.4th 1164, 1221.) Valencia testified that defendant remained in control of the

situation during the entire incident. At the very most, he sat on the sofa and watched the rest of the events unfold. He allegedly took the telephone away from Basurto and told Teran not to kill the men, but he admitted that Teran insisted that the four men had to be killed. He further claimed that he followed Teran's truck because he thought she was taking him to the freeway so he could leave. However, he never told Basurto, Francisco, or even Teran that he was withdrawing from his prior agreement with Basurto. He did not take any steps to protect the men, even though he knew that Teran refused to back down from her orders to Basurto to kill the four men. The jury obviously rejected defendant's credibility and his trial claims on all these matters. We find that defendant's convictions for attempted murder and murder are supported by overwhelming evidence.

II. Substantial evidence of kidnapping

Defendant was convicted of four counts of kidnapping. On appeal, he contends that two of these counts are not supported by substantial evidence.

“To prove a defendant guilty of kidnapping, the prosecution must establish that (1) the defendant took, held, or detained another person by using force or by instilling reasonable fear; (2) using that force or fear, the defendant moved the other person, or made the other person move a substantial distance; and (3) the other person did not consent to the movement. (§ 207, subd. (a).)” (*People v. Burney* (2009) 47 Cal.4th 203, 232.) “[T]he word ‘substantial’ means a ‘significant amount’ as contrasted with a distance that is ‘trivial’ ” (*People v. Morgan* (2007) 42 Cal.4th 593, 606-607.)

There is overwhelming evidence to support defendant's convictions for four counts of kidnapping. As explained in section I, *ante*, Valencia testified that defendant was in charge of the entire situation, and Basurto and Francisco followed his orders. Defendant ordered the two gunmen to move the men into the garage, two at a time. Valencia and Rafael were carried into the garage because their legs were bound. They were eventually removed from the car because the vehicle wouldn't start. Defendant, Basurto, and Francisco later moved all four men into the Jeep. Basurto drove the Jeep

into the field while defendant followed in the black truck. The entirety of the record thus supports the jury's convictions for the kidnapping of all four men.

As in issue I, *ante*, defendant's challenges to his kidnapping convictions are primarily based on his own trial testimony. Defendant concedes that he was still assisting Basurto when he carried Valencia and Rafael into the garage, and that he was properly convicted of two counts of kidnapping based on the movement of those two victims. However, defendant again asserts that he withdrew from his prior "contract" with Basurto before the four men were moved into the Jeep, and before Basurto drove the men into the field. Defendant thus argues that he was improperly convicted of kidnapping Juan and Eraclio, because those two men were moved into the Jeep after he had withdrawn from his contract with Basurto.

As explained in section I, *ante*, defendant's own testimony fails to establish that he met the legal standard to have withdrawn as an aider and abettor. Moreover, the jury heard and rejected defendant's version of events, and his convictions for four counts of kidnapping are supported by overwhelming evidence.

III. The flight instruction was supported by the evidence

Defendant contends the court erroneously instructed the jury with CALCRIM No. 372, flight, because the instruction was not supported by the evidence.

A. CALCRIM No. 372

As given to the jury in this case, CALCRIM No. 372 states:

"If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it's up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

The trial court has a sua sponte duty to give the flight instruction pursuant to section 1127c, which "requires that whenever evidence of flight is relied on to show guilt, the court must instruct the jury that while flight is not sufficient to establish guilt, it is a

fact which, if proved, the jury may consider. This statute was enacted to abolish the common law rule that the jury could not be instructed on flight unless there was evidence defendant knew he had been accused. [Citations.]” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243; *People v. Henderson* (2003) 110 Cal.App.4th 737, 742.)

“ ‘In general, a flight instruction “is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.” ’ [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest ‘a purpose to avoid being observed or arrested.’ [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence. [Citation.]” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328, italics in original.)

“[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.” (*People v. Crandell* (1988) 46 Cal.3d 833, 869, disapproved on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) Moreover, the instruction assumes neither the guilt nor the flight of the defendant. (*People v. Campos* (1982) 131 Cal.App.3d 894, 900; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1029, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 911, 914, 923-925.) “Alternative explanations for flight conduct go to the weight of the evidence, which is a matter for the jury, not the court, to decide. [Citations.]” (*People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1477.)

“The focus of the instruction is on the defendant and the question of whether there was flight and whether it is reasonable to infer consciousness of guilt from such flight. The instruction goes on to limit the jury’s use of the evidence in that it advises the jury that flight alone cannot support a finding of guilt. Thus [the instruction] serves the dual

purpose of permitting an inference of guilt, but at the same time provides the defendant with some protection against misuse of such evidence. [Citations.]” (*People v. Henderson, supra*, 110 Cal.App.4th at p. 742.)

B. Analysis

The flight instruction was supported by Valencia’s testimony, and defendant’s pretrial statements and his own trial testimony. Valencia testified that defendant was in control of events, and that he repeatedly ordered Basurto to kill Valencia and the other three men. Defendant threatened to kill Basurto’s family if he failed to kill the four men. Defendant ordered Basurto to place the four men in the Jeep, while defendant got into a black pickup truck that was also parked in front of the house.

Valencia testified that Basurto pulled away from the house, but he stopped the Jeep and had a brief conversation with Juan. Basurto looked back, realized the other truck was following him, and then started to drive the Jeep again. Valencia’s testimony on this point strongly implied that Basurto might have been willing to let the men go, but that he felt compelled to continue and comply with defendant’s orders when he saw the other vehicle, which contained defendant.

Based on Valencia’s testimony, the jury could have reasonably concluded that defendant knew Basurto was going to kill the four men when they reached the orchard. There is undisputed evidence that Basurto fired at least nine shots at the four men, killing three of them in and around the Jeep and leaving their bodies where they fell, but missing the frantic Valencia as he ran from the field.

Defendant’s own statements provided the additional evidence in support of the flight instruction. Defendant said that immediately after the murders, Basurto ran back to Teran’s truck and they immediately left the area. They did not return to the North Chance Street house, but instead everyone met at the house of defendant’s sister in Dinuba, where they exchanged vehicles. The next morning, Basurto and Teran were found at a Reedley motel, instead at the North Chance house where they had been living.

In the meantime, defendant went back to Minnesota and then left for Mexico, where the previously agreed-upon contract price of \$6,000 was wired to him.

Based on this evidence, there was substantial evidence to support the flight instruction because the jury could have found defendant, who was in control of the situation and repeatedly ordered Basurto to kill the men, fled immediately after the murders, and permissibly infer a consciousness of guilt from the evidence. (*People v. Bonilla, supra*, 41 Cal.4th 313, 328.)

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Wiseman, Acting P.J.

Franson, J.